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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES COLBERT,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0511-CR-1092
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Master Commissioner
Cause No. 49G05-9608-CR-108410

August 23, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Charles Colbert, Jr., appeals the trial court's revocation of his probation. Colbert raises one issue, which we restate as whether the trial court abused its discretion by ordering Colbert to serve his twelve-year suspended sentence. We affirm.

The facts most favorable to the revocation follow. On August 29, 1996, the State charged Colbert with six counts of class B felony child molesting.¹ Pursuant to a plea agreement, Colbert agreed to plead guilty to one count of child molesting as a class B felony under this cause and to one count of child molesting as a class C felony² under cause number 49G01-9610-CF-165629. The State, in exchange, agreed to dismiss five counts of child molesting as a class B felony under this cause and one count of public indecency as a class A misdemeanor³ under cause number 49G01-9610-CF-165629. Furthermore, the State agreed to open sentencing on the C felony charge and agreed to a maximum executed sentence of eight years on the B felony charge. The trial court accepted the plea agreement and sentenced Colbert to a term of twenty years, with eight years executed and twelve years suspended. He was further ordered to serve ten years on probation following his release from prison.

On September 22, 2004, Colbert began his probation. On August 25, 2005, the probation department filed a notice of probation violation, alleging that Colbert had: (1) failed to maintain a verifiable address within Marion County; (2) failed to notify law

¹ Ind. Code § 35-42-4-3(a) (2004).

² Ind. Code § 35-42-4-3(b) (2004).

³ Ind. Code § 35-45-4-1(a) (2004).

enforcement of a change in residence as required by the Indiana Sex and/or Violent Offender law; (3) failed to comply with sex offender treatment; (4) consumed alcohol; and (5) failed to comply with payments toward his monetary obligations. On October 25, 2005, an amended notice of probation violation was filed, which additionally alleged that Colbert had: (6) failed to comply with the trial court's order of no contact with minors; and (7) traveled out of the State of Indiana without permission of the trial court or the probation department.

On November 2, 2005, the trial court held a hearing on the amended notice of probation violation. Colbert, by his attorney, admitted the truth of the State's seventh allegation, acknowledging, "he did at one point travel outside the State of Indiana," but denied all other alleged violations. Contested Violation of Probation Hearing Transcript at 17-18. Colbert's father ("father") testified during the hearing in regard to the State's seventh allegation. The father testified that he and his wife, along with Colbert and his girlfriend, Tonya, drove down to Louisiana to pick up Tonya's adult daughter from college to bring her back to Indiana. The father testified that the trip was brief, that they "didn't stop to rest or anything" and that they "continuously drove all the way back for the next day." Id. at 31.

The State's sixth allegation that Colbert had contact with minors in violation of his probation was supported by the testimony of Lou Ella Lewis. Lewis testified that she hosted a picnic at her home, which Colbert, along with fifty or sixty other individuals attended. Lewis testified that approximately "sixteen, seventeen" of the attendees were

minor children ranging from one to seventeen years of age. A list of minor children prepared by relatives of Lewis was submitted into evidence that showed fourteen children were present at the picnic. Lewis further testified that Colbert was at the picnic “a long time” and that “he sat and ate dinner with us at our table.” Id. at 24.

Additionally, the State attempted to prove allegations one through five cited in the notice of probation violation. At the conclusion of the hearing, the trial court found that the State failed to prove those violations by a preponderance of the evidence. Nonetheless, the trial court concluded that, as to the sixth and seventh allegations, the State had proved by a preponderance of the evidence that Colbert had violated the trial court’s order to have no contact with minors and that Colbert admitted that he left the State of Indiana without permission of the court or the probation department. The trial court found that Colbert violated the conditions of his probation and ordered him to serve his twelve-year suspended sentence.

The sole issue is whether the trial court abused its discretion by ordering Colbert to serve his twelve-year suspended sentence. We review a trial court’s decision to revoke probation and a trial court’s sentencing decision in a probation revocation proceeding for an abuse of discretion. Sanders v. State, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before the court. Brattain v. State, 777 N.E.2d 774, 776 (Ind. Ct. App. 2002). “When reviewing a trial court’s decision to order a defendant’s previously suspended sentence to be executed after revoking probation, we will not

review the propriety of an original sentence.” Johnson v. State, 692 N.E.2d 485, 488 (Ind. Ct. App. 1998). However, a defendant “is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed.” Stephens v. State, 818 N.E.2d 936, 939 (Ind. 2004).

Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. Brabandt v. State, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003) (citing Bonner v. State, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002), trans. denied.) These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. Id. As we have noted on numerous occasions, a defendant is not entitled to serve a sentence in a probation program; rather, such placement is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Strowmatt v. State, 779 N.E.2d 971, 976 (Ind. Ct. App. 2002); Davis v. State, 743 N.E.2d 793, 794 (Ind. Ct. App. 2001), trans. denied.

Once a defendant has been sentenced, “the court may revoke or modify probation, upon a proper showing of a violation, at any time before the completion of the probationary period.” Gardner v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997). A probation revocation hearing is in the nature of a civil proceeding and the alleged violation need be proven only by a preponderance of the evidence. Pitman v. State, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001), trans. denied. Moreover, violation of a single condition of probation is sufficient to revoke probation. Id. Therefore, upon finding that

a probationer has violated a condition of probation, a court may either: (1) continue probation, with or without modifying or enlarging the conditions; (2) extend probation for not more than one year beyond the original probationary period; or (3) order execution of all or part of the initial sentence that was suspended. Ind. Code § 35-38-2-3(g) (2004).

Here, Colbert admits that he violated a condition of his probation when he left the State of Indiana without first receiving permission from the probation department or the court. However, Colbert argues that the State presented insufficient evidence to the trial court to prove by a preponderance of the evidence that he had contact with minors in violation of the trial court's order and therefore, in regard to this allegation, the trial court improperly revoked his probation. Accordingly, Colbert argues that based on his sole probation violation of traveling outside the state, the trial court's imposition of his twelve-year suspended sentence was unreasonable given the nature of his probation violation and his character.

We first address Colbert's argument that the evidence was insufficient to prove beyond a preponderance of the evidence the trial court's finding that he had violated the no contact with minors condition of his probation and thus the trial court's revocation of his probation was improper. The State's evidence showed Colbert had been present at the picnic long enough in order to sit down and eat, that fifty to sixty persons were in attendance and, of those persons, fourteen were minor children. However, the State submitted no evidence to the trial court that definitively established that Colbert had

come into close proximity with minors, let alone touched or communicated with any minors. Nonetheless, we need not decide this issue at this time as it is well established that proof of a single violation of the conditions of probation is sufficient to support the decision to revoke probation. Pitman, 749 N.E.2d at 559; see also Smith v. State, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000); Wilson v. State, 708 N.E.2d 32, 34 (Ind. Ct. App. 1999). Colbert admits that he traveled out of state in violation of the conditions of his probation. The trial court emphasized that Colbert's decision to leave the state was a deliberate and well-planned departure in clear violation of his conditions of probation.

Decisions whether to revoke probation are a matter within the sound discretion of the trial court. Brabandt v. State, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003). Therefore, we conclude that Colbert's single violation of traveling out of state without permission was sufficient for the trial court to have revoked his probation. See, e.g., Pitman, 749 N.E.2d at 559-560 (affirming the trial court's revocation of the defendant's probation following a single violation of the conditions of her probation).

We next address Colbert's assertion that the trial court's imposition of his twelve-year suspended sentence was unreasonable given the nature of his probation violation and his character. Colbert urges this court to apply the standard of review purportedly adopted by the Indiana Supreme Court in Stephens v. State, 818 N.E.2d 936, 943 (Ind. 2004), when reviewing a trial court's sentencing decision in a probation revocation proceeding. Colbert asserts that given the nature of his probation violation as "fairly

minor” along with his overall good character,⁴ the trial court’s decision to impose all twelve years of his suspended sentence was unreasonably excessive. Appellant’s Brief at 8-9. However, this court recently addressed the standard of review relied upon by Colbert:

It is not clear from our supreme court’s decision what standard of review it used when reviewing whether the defendant’s probation revocation sentence was unreasonable. Although some of the language used suggests that it may have used Ind. Appellate Rule 7(B), we believe – given our existing caselaw regarding appellate review of a trial court’s probation decisions and regarding the prohibition against collaterally attacking an original sentence following revocation of probation – that the standard of review used when reviewing whether a defendant’s probation revocation sentence is unreasonable is an abuse of discretion. Therefore, we will review [the defendant’s] sentence on revocation for an abuse of discretion.

Sanders v. State, 825 N.E.2d 952, 957 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances before the court. Brattain v. State, 777 N.E.2d 774, 776 (Ind. Ct. App. 2002). Consequently, on review, we are not required to determine whether the trial court’s imposition of Colbert’s entire twelve-year suspended sentence was unreasonable or excessive in light of the nature of his violation and his character. As mentioned, upon finding that a probationer has violated a condition of probation, Ind. Code § 35-38-2-3(g) gives trial courts the statutory authority to either:

⁴ Colbert argued that during the probation violation hearing, the trial court failed to properly balance Colbert’s criminal history against the fact that he admitted violating his probation by traveling out of state, and thus his good character was undermined. However, Colbert’s argument finds no support. See Bussberg v. State, 827 N.E.2d 37, 43 (Ind. Ct. App. 2005) (holding that there is no authority which “leads us to conclude that a trial court must give reasons why it is choosing to impose the particular punishment that it does for a probation violation”), reh’g denied, trans. denied.

- (1) continue probation, with or without modifying or enlarging the conditions;
- (2) extend probation for not more than one year beyond the original probationary period; or
- (3) order execution of all or part of the initial sentence that was suspended.

Thus, we conclude, when the trial court found Colbert to be in violation of the conditions of his probation, its decision to exercise its statutory authority pursuant to Ind. Code § 35-38-2-3(g)(3) and order execution of all of Colbert's initial sentence that was suspended was not an abuse of its discretion. See, e.g., Sandlin v. State, 823 N.E.2d 1197, 1198 (Ind. 2005) (affirming the trial court's decision to order the defendant to serve his entire four-year suspended sentence); Jones v. State, 838 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (holding that the trial court did not abuse its discretion by ordering the defendant to serve thirty years of his previously suspended sentence).

For the foregoing reasons, we affirm the trial court's revocation of Colbert's probation.

Affirmed.

NAJAM, J. and ROBB, J. concur